A **LEMBAGA HASIL DALAM NEGERI MALAYSIA**

v.

ALAM MARITIM (M) SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
SYED AHMAD HELMY JCA
BALIA YUSOF WAHI JCA
[APPEAL NO: W-01-268-2010]
C 21 MARCH 2012

REVENUE LAW: *Income Tax - Double taxation - Non-resident companies without permanent establishment in Malaysia - Whether protected by article IV of Double Taxation Agreement - Whether relieved* D *from taxation - Whether provisions of avoidance of double-tax treaties takes precedence over Income Tax Act 1967*

The applicant/respondent was a private company whose main activities were confined to the ownership of vessels and the provision of vessel hire and management. The applicant entered E into the contract of "Uniform Time Charter Party for Offshore Service Vessels" between 1998 to 2004. The contract concerned the payment of charter fees for the supply of ships together with crew in the form of services with non-resident companies operating the business of time charter of ship and crew ('time charter F services'). The non-resident companies did not have a permanent establishment in Malaysia and the majority was from Singapore whereas the others were from countries which had entered into avoidance of double taxation treaties which essentially are agreements for relief against double taxation. Throughout the G duration of the contract, the non-resident companies received, from the applicant, the payment of charter fees in full without withholding tax. In May 2005, the applicant sought a private ruling from the appellant that the applicant's payments to the non-residents companies without deduction of withholding tax was H correctly done. However, *via* a letter dated 21 May 2007, the appellant notified the applicant that the applicant was obliged to deduct withholding tax on the payments made by the applicant pursuant to s. 109B of the Income Tax Act 1967 ('ITA'). The applicant thus filed an application for judicial review and the High I

Court found in favour of the applicant. Hence this appeal by the appellant. It was the appellant's case that the High Court judge erred in facts and law in failing to take into account the principles propounded in the case of *Hock Heng Company Sdn Berhad v. Director General of Inland Revenue* ('Hock Heng') and by failing to take into account that art. IV of the Double Taxation Agreement ('DTA') was not applicable to the applicant.

Held (dismissing appellant's appeal with costs; affirming decision of the High Court)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The case of *Hock Heng* was distinguishable on the facts where the Privy Council held that under art. XVII para 1 of the Double Taxation Relief Order 1996 ('the Order'), the laws of Malaysia were to continue to govern the taxation of income in Malaysia except where express provision to the contrary was made in the Order. Since the Order did not contain any provision requiring losses sustained in Singapore to be dealt with differently from the way they were dealt with under the ITA, losses were deductible in the computation of income from "wherever derived". However, in the present case, the non-resident companies did not have permanent establishment in Malaysia and art IV of the DTA protected the applicant and afforded relief from taxation to these enterprises. In light of this, the letter dated 21 May 2007 by the appellant was issued in excess of jurisdiction. *Hock Heng Company Sdn Berhad v. Director General of Inland Revenue* (dist). (paras 17-19 & 21)

(2) Pursuant to the avoidance of double-tax treaties entered between the Government of Malaysia and each of the governments of the countries in which the non-resident companies operate their respective businesses, the income received by them are taxable as business income in the country where they actually reside or originate from. Thus, all payments to account received from the applicant during the said period comprised income or profits of a foreign enterprise with no permanent establishment in Malaysia, which were afforded relief from tax in Malaysia by virtue of the avoidance of double tax treatises. (paras 24 & 25)

(3) The provisions of these treaties take precedence over the ITA. With the relief from double taxation afforded to these non-resident companies in Malaysia, the applicant was not at all obliged to make deductions of withholding tax in respect of the payments to the said non-resident companies. *Director General of Inland Revenue v. Euromedical Industries Ltd* (refd). (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon/responden adalah syarikat swasta yang mana aktiviti utamanya terbatas kepada milikan kapal dan peruntukan untuk sewaan dan pengurusan kapal. Pemohon memasuki kontrak "Uniform Time Charter Party for Offshore Service Vessels" antara tahun 1998 hingga 2004. Kontrak tersebut berkaitan dengan bayaran fi charter bagi pembekalan kapal-kapal berserta dengan krew dalam bentuk perkhidmatan dengan syarikat-syarikat bukan residen yang menjalankan perniagaan charter masa kapal dan krew (perkhidmatan charter masa). Syarikat bukan residen tidak mempunyai institusi tetap di Malaysia dan majoritinya adalah dari Singapura sementara yang lainnya adalah dari negara-negara yang telah memasuki perjanjian penghindaran pajak berganda yang pada asasnya adalah perjanjian-perjanjian bagi pelepasan cukai berganda. Sepanjang tempoh kontrak, syarikat-syarikat bukan residen menerima, daripada pemohon, bayaran fi charter yang penuh tanpa cukai pegangan. Pada Mei 2005, pemohon memohon perintah persendirian daripada perayu bahawa bayaran-bayaran oleh pemohon kepada syarikat-syarikat bukan residen tanpa pemotongan cukai pegangan dibuat secara betul. Walau bagaimanapun, melalui surat bertarikh 21 Mei 2007, perayu memberitahu pemohon bahawa pemohon bertanggungjawab untuk memotong cukai pegangan atas bayaran-bayaran yang dibuat oleh pemohon dibawah s. 109B Akta Cukai Pendapatan 1967 ('Akta'). Pemohon oleh itu memfailkan permohonan untuk semakan kehakiman dan Mahkamah Tinggi memutuskan memihak kepada pemohon. Maka rayuan ini oleh perayu. Kes perayu adalah bahawa hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira prinsip-prinsip yang dikemukakan di dalam kes *Hock Heng Company Sdn Berhad v. Director General of Inland Revenue* ('Hock Heng') dan apabila gagal mempertimbangkan bahawa perkara IV Perjanjian Pajak Berganda ('PPB') tidak terpakai kepada pemohon.

Diputuskan (menolak rayuan perayu dengan kos, mengesahkan keputusan Mahkamah Tinggi)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Kes *Hock Heng* adalah berbeza dari segi fakta apabila Majlis Privi memutuskan bahawa di bawah perkara XVII perenggan 1 Perintah Pelepasan Cukai Berganda 1996 ('Perintah tersebut'), undang-undang Malaysia berterusan mentadbir pentaksiran pendapatan di Malaysia kecuali di mana terdapat peruntukan langsung sebaliknya dibuat dalam Perintah tersebut. Oleh sebab Perintah tersebut tidak mengandungi apa-apa yang memerlukan kerugian yang dialami di Singapura diuruskan secara berbeza daripada cara ia diuruskan di bawah Akta tersebut, kerugian boleh dipotong dalam pengiraan pendapatan daripada "diperolehi dari mana-mana". Walau bagaimanapun, dalam kes ini, syarikat-syarikat bukan residen tidak mempunyai institusi tetap di Malaysia dan perkara IV PPB melindungi pemohon dan memberikan pengecualian pentaksiran kepada syarikat-syarikat ini. Dengan itu, surat bertarikh 21 Mei 2007 oleh perayu dikeluarkan di luar bidang kuasa. *Hock Heng Company Sdn Berhad v. Director General of Inland Revenue* (dibezakan).

(2) Menurut perjanjian penghindaran pajak berganda antara Kerajaan Malaysia dan setiap kerajaan di negara-negara yang mana syarikat-syarikat bukan residen mempunyai perniagaan masing-masing, pendapatan yang diterima oleh mereka boleh ditaksir sebagai pendapatan perniagaan di negara di mana mereka sebenarnya menetap atau berasal. Oleh itu, kesemua bayaran untuk akaun yang diterima daripada pemohon semasa tempoh tersebut termasuk pendapatan atau keuntungan syarikat asing tanpa penubuhan tetap di Malaysia, yang diberikan pengecualian cukai di Malaysia menurut perjanjian-perjanjian penghindaran pajakan berganda.

(3) Peruntukan-peruntukan perjanjian ini mengatasi Akta tersebut. Dengan pengecualian daripada pajakan berganda yang diberikan kepada syarikat-syarikat bukan residen di Malaysia, pemohon tidak bertanggungjawab membuat pemotongan cukai pegangan berkaitan dengan bayaran-bayaran kepada syarikat-syarikat bukan residen tersebut. *Director General of Inland Revenue v. Euromedical Industries Ltd* (dirujuk).

Case(s) referred to:

Director General of Inland Revenue v. Euromedical Industries Ltd [1983] 1 CLJ 281; [1983] CLJ (Rep) 128 FC ***(refd)***

Hock Heng Company Sdn Berhad v. Director-General of Inland Revenue [1979] 1 LNS 30 PC ***(dist)***

Legislation referred to:

Income Tax Act 1967, ss. 4A(iii), 109B

For the appellant - Hazlina Hussain (Ahmad Khairuddin Abdullah with her); SFCs

For the applicant/respondent - R Thilakan; M/s Thilakan & Co

Reported by S Barathi

JUDGMENT

Abdul Malik Ishak JCA:

[1] This is an *ex tempore* judgment of this court.

[2] This is an appeal by Lembaga Hasil Dalam Negeri Malaysia ("the appellant") against the decision of the High Court dated 31 March 2010 which allowed Alam Maritim (M) Sdn Bhd's ("the applicant's") application for judicial review with costs of RM3,000.

[3] The applicant is a private company whose main activities are confined to the ownership of vessels and the provision of vessel hire and management. The applicant's operations centred on providing services to Petroliam Nasional Berhad.

[4] Between 1998 to 2004 ("the said period"), the applicant entered into the "Uniform Time Charter Party for Offshore Service Vessels" contracts which concerned the payment of charter fees for the supply of ships together with crew in the form of services with non-resident companies operating the business of time charter of ship and crew ("Time Charter Services").

[5] Throughout the duration of the said period, these non-resident companies received to account of their business income, payment in full of such charter fees from the applicant. And these non-resident companies received from the applicant payment in full without withholding tax for the Time Charter Services rendered.

[6] It must be borne in mind that none of these non-resident companies have a permanent establishment in Malaysia. A

[7] And the majority (17 out of 22) of these non-resident companies were from Singapore. The rest were from other countries which had entered into avoidance of double taxation treaties which had been given legal force and effect by orders of the Minister. Essentially these are agreements for relief against double taxation. B

[8] On 16 May 2005, the applicant's tax adviser wrote to the appellant and sought for a private ruling that the applicant's payments to the non-resident companies without deduction of withholding tax was correctly done. C

[9] On 7 July 2005, the appellant rendered its opinion that "bayaran ini adalah tertakluk kepada cukai pegangan di bawah s. 109B Akta Cukai Pendapatan 1967". D

[10] On 1 August 2005, the appellant requested the applicant to confirm "samada bayaran untuk cukai pegangan" have been paid to the appellant. E

[11] On 16 August 2005, the applicant's solicitors submitted an application to the appellant for a decision on the issue of withholding tax.

[12] On 21 May 2007, the appellant by way of a letter gave its reply to the effect that the applicant is obliged to deduct withholding tax on the payments made by the applicant pursuant to s. 109B of the Income Tax Act 1967 based on the stand taken by the appellant in its letter dated 7 July 2005 that payment of "charter-fees" to non-resident companies constitute a special class of income under sub-section 4A(iii) of the Income Tax Act 1967. F G

[13] Aggrieved, the applicant then filed an application before the High Court for a judicial review, and the High Court found in favour of the applicant. Hence, the present appeal by the appellant before this court. H

[14] There are common facts among the parties that have propelled itself to the forefront, namely: I

A (a) that the appellant does not deny the non-resident status of the non-resident companies;

(b) that all the non-resident companies do not have a permanent establishment in Malaysia;

B (c) that the applicant, on its own accord, applied for a decision from the appellant by letter dated 16 August 2005;

(d) that the payments received by the non-resident companies from the applicant were business income; and

C (e) that the tax sought by the appellant to be withheld is not income tax of the applicant but is that of the recipient non-resident companies.

D **[15]** In its memorandum of appeal, the appellant avers that the High Court Judge erred factually and legally by failing to take into account the legal principles propounded in *Hock Heng Company Sdn Berhad v. Director-General of Inland Revenue* [1979] 2 MLJ 51, PC; [1950-1985] MSTC 42, PC, and also by failing to take into account that Article IV of the agreement between the Government E of Malaysia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("DTA") is not applicable to the applicant.

F **[16]** Put differently, what the appellant is saying is that the applicant is obliged to deduct withholding tax on the payments made by the applicant pursuant to s. 109B of the Income Tax Act 1967 based on the premise that payment of "Charter Fees" to non-resident companies constitute a special class of income under G s. 4A(iii) of the Income Tax Act 1967 and the agreements between governments for the avoidance of double taxation with respect to taxes on income ("DTA") cannot be called upon to afford relief from tax.

H **[17]** We have perused through the judgment of the learned High Court Judge with a fine toothcomb and Her Ladyship considered at length the case of *Hock Heng Company Sdn Berhad v. Director-General of Inland Revenue (supra)*. But *Hock Heng*'s case is certainly distinguishable on its facts. There, Hock Heng (taxpayer) was "a I company incorporated and resident in Malaysia, had in 1968 an

income of $31,415 derived in Malaysia and had suffered a loss in that year of $538,335 on the operations of its branch in Singapore ...". And the Privy Council had to consider the question of whether in computing the taxpayer company's chargeable income for 1968, that loss was to be ignored or brought into account on the basis that the Double Taxation Relief Order 1996 overrode the provisions of the Income Tax Act 1967. The Special Commissioners held that the loss could be set-off against the profits made in Malaysia. This decision was reversed by the Federal Court, affirming the decision of the High Court. The taxpayer appealed. The appeal was allowed and the Privy Council held that under Article XVII paragraph 1 of the Order, the laws of Malaysia were to continue to govern the taxation of income in Malaysia except where express provision to the contrary was made in the Order. Since the Order did not contain any provision requiring losses sustained in Singapore to be dealt with differently from the way they were dealt with under the Income Tax Act 1967, the losses were deductible in the computation of income from "wherever derived".

[18] Here, the non-resident companies do not have a permanent establishment in Malaysia, and that sets apart the present appeal from the facts of *Hock Heng*'s case.

[19] Taking stock of the situation further, we must categorically say that the legal principles enunciated by Viscount Dilhorne in *Hock Heng*'s case are germane to the occasion at hand and would certainly favour the applicant. When referring to Article XVII of the Double Taxation Relief Order 1996 which provided that, "The laws of each contracting state shall continue to govern the taxation of income in that state except where express provision to the contrary is made in this agreement", Viscount Dilhorne held that, "The laws of Malaysia are to continue to govern the taxation of income in that state except where express provision to the contrary is made in the agreement. Express provision is made for the exemption of tax in Malaysia of income which suffers tax in Singapore ...".

[20] Now, even the dissenting judgment of Lord Russell of Killowen in Hock Heng's case recognised that, "Malaysian tax was not to be imposed on profits of the Singapore establishment at all. Profits of the Singapore establishment were to be wholly irrelevant to Malaysian tax".

[21] In the context of the present appeal, the appellant concedes that the non-resident Singapore enterprises do not have permanent establishment in Malaysia. That being the case, article IV of the DTA protects the applicant and affords relief from taxation to these enterprises. In our judgment, the letter dated 21 May 2007 emanating from the appellant was issued in excess of its jurisdiction.

[22] Article IV of the DTA in all its splendour is worded in this way:

> 1(a) The income or profits of a Singapore enterprise shall not be taxable in Malaysia unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia. If the enterprise carries on business as aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only on so much thereof as is derived by that permanent establishment in Malaysia.

[23] It restates the generally accepted principle of double taxation conventions that an enterprise of one state shall not be taxed in the other state unless it carries on business in that other state through a permanent establishment situated therein.

[24] It is crystal clear that in accordance with the avoidance of double tax treaties entered between the Government of Malaysia and each of the governments of the countries in which the non-resident companies operate their respective businesses, the income received by them are taxable as business income in the country where they actually reside or originate from.

[25] Thus, all payments to account received from the applicant during the said period comprise income or profits of a foreign enterprise with no permanent establishment in Malaysia, which are afforded relief from tax in Malaysia by virtue of these avoidance of double tax treatises.

[26] In our judgment, with the relief from double taxation afforded to these non-resident companies in Malaysia, the applicant is not at all obliged to make deductions of withholding tax in respect of the payments to the said non-resident companies. It must be borne in mind that the provisions of these treaties take precedence over the Income Tax Act 1967 (per Wan Suleiman FJ in *Director-General of Inland Revenue v. Euromedical Industries Ltd* [1983] CLJ (Rep) 128, FC).

[27] For the reasons adumbrated in this *ex tempore* judgment, we dismiss the appellant's appeal with costs of RM20,000. We affirm the decision of the High Court. The deposit, if any, should rightly go to the applicant respondent.